No 55-87-

In the Justice Court

of the State of California

Charles Ling et al

vs

J. B. Haggin et al

Petition for

Reference

Henry Ashworth

Attorney for Petitioner

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In the Supreme Court
of the
State of California

In Bank

Charles Lux et al
Appellants
vs
James B. Haggin et al
Respondents

We respectfully submit some additional suggestions for a rehearing in this cause and request the Court to consider this manuscript because the time remaining does not permit its going to print. While differing with the Court, we do not propose to discuss any of the legal propositions enunciated in the opinion on file, but to endeavor to illustrate that the opinion delivered is based upon grave mistakes of fact apparent upon the record besides those observable from the able Petitions for rehearing already on file. Of course if the appellants are not Riparian owners they have no standing in Court. We especially invite attention of the Court to the following - being the material part of the opinion of the Court relating to this subject

The defendant also introduced evidence tending to prove that by reason of natural obstructions, at certain points in Buena Vista slough, above plaintiffs' lands, the water of said slough did not flow over any of said lands. After the defendant had rested, the plaintiffs called witnesses to prove that there were no such obstructions at those points. To the introduction of such evidence an objection was made and sustained. This ruling was erroneous.

The court found that neither of the parties was a riparian proprietor. If that be the fact, there is no occasion for considering what their respective rights would be were the fact otherwise. If the plaintiffs were not riparian proprietors, they have no cause of action. If they are, and the defendant is not, it has no right to interfere in any way with the natural flow of a stream of water over the plaintiffs' land. A riparian proprietor has a right to the reasonable use of water flowing in a natural stream over his land. What may be a reasonable use in any given case depends upon the facts and circumstances of that case. But it is only as between riparian proprietors that the question can ever arise. According to the findings of the court, the question of riparian rights is in no way involved in the case.

The plaintiffs must prove by a preponderance of evidence, that there is a natural watercourse running through their land, from which the defendant has diverted or obstructed the natural flow of the water, before they will be entitled to any relief; and even then they will not be entitled to any, if the defendant proves by a preponderance of evidence that the water so diverted was duly appropriated, in accordance with the law of this state, while said land was owned by the state or the United States: Osgood v. E. D. W. Co., 56 Cal., 571; 11 Otto., 277.

The first paragraphs above stated in the opinion does not in the least express or indicate any legitimate deduction from any or all the facts proven or sought to be proven by the "Defendants"

The "Defendant" did not introduce any "evidence tending to prove that by reason of natural obstructions at certain points in Buena Vista Slough, above Plaintiff's lands the water of said Slough the water of said did not flow over any of said lands"

The whole line of Defendants evidence was to show and did show that the waters of Kern River entered Buena Vista Slough at the delta of New River (now called Kern River) and thence flowed naturally southward

into Kern and Buena Vista Lakes
and only in cases of great and occasional
overflows, after filling said lakes did the
water back northward and reach Buena
Vista Swamp or any of the lands of the
Plaintiff, and then by no defined
Channel but only after spreading entirely
over said swamp - before as well as
after reaching the swamp lands of Plaintiff,
said Swamp being some 50 miles in length
and several miles wide and all of
Plaintiff's lands being entirely in said swamp
In other words that there was no natural
watercourse running through plaintiffs land
from which Defendant had water
The evidence upon this subject as shown in
the manuscript of the record is voluminous
and greatly preponderating in favor of Plaintiff
and it is clear that the first paragraph
above taken from the opinion does not
correctly state the facts but does state
the opposite of the great body of the
facts introduced by the Defendant upon
this subject - and is as an isolated
proposition absolutely contrary in its mean-
ing to all the findings of fact by the
Court. We invite attention, without special
reference to all the testimony on behalf

of Defendant upon this subject and especially ask the Court to read in connection the following findings of fact.

712 17.

That in their natural condition, whatever of the waters of said river or of said lakes, find or ever found their way northward and into said swamp, do not and never did so flow as to constitute a water-course; and the same are and always have been used and accustomed, whenever they reach it, to flow generally over and through said swamp and to squander themselves over the same, spreading from side to side, and having as a boundary and border on each side, the public lands of the United States, outside of the segregation lines
713 of said swamp, as laid down on said map.

18.

That in part, the diagram annexed to the complaint herein, shows the courses and channels of Kern River, and the sloughs and lakes in said complaint mentioned, but not fully and correctly, and except in the particular in finding No. 72 specified, the same are correctly and fully shown and delineated on the map hereto annexed, marked "Exhibit A," and made part of these findings; and said map marked "Exhibit A," correctly shows the
714 body of swamp and overflowed lands within Kern County, which is referred to in these findings as "Buena Vista Swamp."

27.

That none of the said lands of the plaintiffs were, during said period in the preceding finding mentioned,
723 deprived of their natural moisture; nor in consequence of any deprivation of their natural moisture, or of any diversion or appropriation by defendant, did they become dry or deteriorated in value.

28.

That a continuance of the diversion and appropriation of the water of Kern River in the future to the extent it has taken place heretofore, and to the capacity of the Calloway Canal, will not deprive the said lands of the plaintiffs of their natural moisture, or
724 cause them to become dry or deteriorated in value, or deprive them of water for general uses, or prevent them from being irrigated or moistened by the waters of said Kern River.

45.

That the said lands of plaintiffs have never bordered or been situated, in whole or in part, upon any water course or natural stream.

And concl following

46.

That no water course or natural stream flows or flowed
743 to, along, by, through, over or upon said lands of plaintiffs, or any part thereof.

47.

That there is not and has not been any right whatsoever to the flow of the waters of Kern River, naturally or otherwise, incident or appurtenant to said lands of plaintiffs, or any part thereof.

48.

That plaintiffs are not and have not been, nor is or was any of them, the riparian proprietors or proprietor,
744 owners or owner of lands on or bordering upon Kern River, or any of the branches, sloughs or channels thereof.

49.

That plaintiffs are not and have not been, and that none of them is or ever has been, by virtue of the ownership, possession or occupation of the said lands of plaintiffs or otherwise, riparian proprietors, owners, proprietor or owner, or entitled to have the waters of Kern River, or any part thereof, flow to, along, by, through, over or upon said lands, or any part thereof,
745 or to take out, divert, appropriate or use any of said waters.

That the natural drainage of Kern River and the surrounding country is, and ever has been, to and into Kern and Buena Vista Lakes, and that in their natural condition Kern and Buena Vista Lakes, when full, form one continuous body or sheet of water; that the natural and usual flow of the waters of Kern River, whether through the South Fork or through Old River or through New River, is and has ever been to and into said lakes, and that the ordinary and natural re-
772 ceptacle, terminus and place of discharge of the natural, usual and accustomed flow of the waters of Kern River is and ever has been Kern and Buena Vista Lakes.

66.

That the waters of Kern River do not and never did naturally and usually flow to, through, along, by, over or upon the said lands of plaintiffs, or any part thereof; and that until the year 1876, whatever of the water of Kern River flowed to or reached the said lands or any part thereof, was from the unusual and extraordinary
773 overflow of said river or of Kern and Buena Vista Lakes, or from the percolation and seepage in these findings mentioned.

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It will be observed that the part of this opinion referring to this main issue in the case - (To wit - whether Plaintiffs are Riparian owners by virtue of the ownership of lands bordering upon a natural watercourse) is exceedingly meagre and inaccurate and does not respond to the great body of the facts proven in the case - It is apparent that the case did not (in the Court below) in the least turn upon the question of "natural obstructions, at certain points in Buena Vista Slough above. Plaintiffs lands (because of which) "the water of said Slough did not flow over any of said lands."

The Court also say - "After the Defendant had rested the Plaintiff called witnesses to prove that there was no such obstructions at those points"

If the Court will recur to the evidence of the Plaintiff in Chief (see nearly all of Volume 2 - Transcript) it will be found that a determined and wearisome effort was made to prove that Plaintiffs lands the ownership of which they claimed made them Riparian Proprietors - were actually on a watercourse and that Defendants diversion of the waters of Kern River - by the Calloway

Canal- was a diversion of water that naturally and usually had theretofore been accustomed to flow to and upon and through their lands.

This testimony it will be observed was directed to show a natural and continuous watercourse through Plaintiff's lands until the diversion by Defendants- A great number of witnesses were examined upon this subject and their testimony was directed to the precise point of proving a natural watercourse throughout Buena Vista swamp, which embraced the lands of Plaintiff

Defendants responded by a large number of witnesses that no such watercourse existed- that the waters of Kern River had their natural and usual termination in Kern and Buena Vista lakes a considerable distance south of the lands of the Plaintiff and south of Buena Vista Swamp- and that no water can reach the lands of Plaintiff except in great occasional overflows- and then in no confined or regular channel but was at such occasional periods a mere overflow of the entire Swamp District in which said lands were situated- And that this was of rare occurence, and ensueing only

after the overflow of Kern and Buena Vista lakes- In fact that Plaintiffs lands only received the water on rare occasions of great overflows and then by and through no channel or watercourse- but by a mere squandering of the surplus water over the entire Swamp.

It is most apparent that the statement of the proposition in the opinion does not give the least idea of the great mass of the facts and findings upon this subject.

But even as to special detail the suggestion is not supported by the record although even if it were- such special matter as to a particular place in Buena Vista Swamp should not be considered as essentially affecting or modifying the great mass of the evidence- because it is ~~most~~ apparently clear that the findings of fact upon this subject were in all respects reasonable and justifiable and indeed necessary from the entire case as presented

But to the matter to which the court probably refers in that part of the opinion above quoted.

It will be found in Volume 5- Pages 1 et seqr- It appears that Defendant in

addition to the general map of evidence theretofore introduced to prove that no watercourse ran through Plaintiff's lands. also introduced a surveying party who had run a line (called a drag line) through the swamp between two given points and made and introduced a profile exhibiting the ~~lead~~ level run on said line, all the other portions of the testimony of Defendants witnesses, including the surveying party were merely and solely contradictory of much evidence of Plaintiff upon precise points and as to the same as well as other localities in the swamp

As rebuttal Plaintiffs offered to show that the Profile by Fullerton and McMurdo for Defendant did not present a correct profile of the locality.

We respectfully and earnestly request the Court to read the 1st " 2nd " 3rd " and 4th " pages of the manuscript Volume 5, wherein this whole matter is fully set forth It will be found that the statement in the opinion that - "After the defendant had rested the plaintiff called witnesses to prove that there were no such obstructions at those points, to the introduction of such evidence an objection was made

and sustained - This ruling was erroneous
is really unsupported by the ~~manu~~ Transcript of
the record
This is a very important case and upon
this precise point we feel that we have
the right to ask the court to consider
this isolated proposition in the opinion
in connection with the whole map
of the evidence upon the subject of a
watercourse in Buena Vista Swamp -
or on or about Plaintiffs lands, and
also especially to observe that Plaintiff
according to Mr McAllister's proposal to the
Court see top page 2 Vol. 5 ~~Manu~~ Transcript
only offered this rebutting testimony to
contradict the accuracy of the level and
profile introduced by Defendant at that
particular point - and that instead of
objection having been made ~~to~~ to the prop-
-osal of Plaintiff in this behalf - such
proposal was practically and in terms accept
-ed - and the court allowed Plaintiff to
introduce ~~in~~ evidence for the purpose
named and proposed by his Counsel
Mr McAllister, . It will be found that it
was only when the witnesses were sought to
be questioned beyond the point so proposed
in order to reopen the question as to the

physical facts observable in Buena Vista
Swamp and about which a large number
of witnesses had been fully examined by
Plaintiff in originally putting in his case,
that objection was made - and upon this
objection the Court properly held that the
question of fact as to continuous slough or
Channels into or through said Swamp had
been fully and exhaustively gone into by
both sides - and that such evidence
was not in rebuttal but merely contradictory
of defendants evidence contradicting that
therefore introduced by Plaintiffs ^ (was merely cumulative)

It will be also observed that this evidence
had no relation to "natural obstructions"
either "above plaintiffs lands" or anywhere else ^ (in fact the line runs about the center)
The whole evidence had been, (on behalf of
defendants) that the natural flow of Kern
River was not and never had been (except
in great and rare overflows) to or towards
Buena Vista Swamp or the lands of Plaintiff
So much upon the proposition that the Court
excluded proper and material evidence
in rebuttal - tending to prove that Plaintiffs
were Rikarian owners.

We are satisfied that a careful recurrence to
the testimony in the record and the
findings of fact by the Court, will illus-

trate that the opinion is upon the most important point erroneous

The closing part of the opinion refers to the important question of estoppel in the following words

Unless the plaintiffs were estopped, and the court does not find that they were, by reason of their acts and conduct while the defendant was constructing its works for the diversion of the water of Kern river, from complaining of such diversion, the findings that the plaintiffs knew of the intention of the defendant to divert said water before any was diverted, and of the construction of works by defendant for that purpose, but made no objection to the operations of defendant before the commencement of this action, are irrelevant. The facts found do not, in our opinion, constitute an estoppel, ~~and if not, the plaintiffs had the full statutory period within which to~~

We respectfully submit that while the actual word "estoppel" is not used ~~often~~ in the findings of fact or the conclusions of law - that still the findings and conclusions fully cover the point - The following are the findings of fact upon this subject - and are fully authorized by the evidence

Finding of facts No. 63 ~~(Transcript Vol 5)~~ to which we invite attention as well as finding No. 64 - which is as follows (We especially invite attention to the word "acquiesced" after "knowledge" - used in both findings)

64.

That the plaintiffs had actual knowledge of the proposed construction of the Calloway Canal, and of the purpose thereof, as herein found, before the same was commenced, and knew of the commencement of the construction thereof at the time such construction began, and knew of the proposed dimensions thereof, and of the continuous construction thereof, as hereinbefore found, and made no objection thereto, but acquiesced therein from the time of the commencement of said construction to the time of filing their complaint in this action.

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Then two findings of fact, (and we ask the Court to read No 63 in this connection) In

Volume 5. Page 193.) appear to present a case of equitable estoppel in the nature of a ~~part~~ parol license - if there really be any such thing known to the law as estoppel - we can imagine no words to add to the findings 63 and 64 - whereby an estoppel could be more clearly or forcibly expressed - The word estoppel (as suggested in the opinion) is not used - and the necessity for using it in the above findings does not seem apparent - It is really a conclusion of law - The fourth conclusion of law would seem sufficient (if a technical rule should be deemed necessary) to cover the findings of fact. We take it however that the Court will see that even applying the rigid doctrine of the Biddle Boggs case the facts in evidence and the findings upon them fully come up to the rule in that case - Our briefs on file refer to a number of authorities upon this precise subject to which we again invite attention.

There is one other point not referred to in the opinion - but fully argued, in the briefs and orally before the Court It is that even if Plaintiff ever had any easement in the waters of Kern River - that they had voluntarily extinguished it -

We now desire merely to call attention of the Court to the findings of fact and ... of law by the Court below upon this subject requesting as to argument and authority the Court will refer to our brief originally filed herein and especially to our Code- on the subject of extinguishment of easements- and the cases to which we referred- as to ~~effect~~ of parol licenses and their being as good and binding after execution as if by grant under seal before execution

That they become irrevocable after execution upon consent or acquiesence- showing that a parol license or consent or acqu-=escence by the Plaintiffs as to the taking possession and control of all the waters of Kern River & Buena Vista Slough by the Kern Valley "Water Company" above and south of the lands of Plaintiff and below and north of the mouth of Kern or new River- was an extinguishment of any easement Plaintiff may ever have had (if any) in such waters. The following facts were found upon this subject

See ~~his~~ findings of fact 68 and 69 Trnscpt Vol 5., Pages 195-196 And the following Conclusion of law thereupon

5.

That by the acts and acquiesence of the plaintiffs as hereinbefore found in the doings of the Kern Valley Water Company, all claims and causes of action growing out of the diversion by the defendant, were before and at the time of the commencement of this action, lost and destroyed, and all riparian rights, if any plaintiffs had, thereby extinguished.

We respectfully request the Court to read findings 68 and 69 - in this connection - This point is not referred to even remotely in the opinion of the Court - and yet it is just and proper to say that Counsel for appellant have always regarded it as embracing a certain and unanswerable proposition in favor of an affirmance of the judgement of the Court below

There are many other suggestions occurring to us, indicative of a mistaken view of the facts as illustrated in the opinion of the Court, but the very short time yet permitted us wherein to prepare these suggestions and the fact that a further would necessarily invite an extended analysis of the evidence enclosed in the record deters us Besides we feel assured that if the Court will kindly consider the suggestions already herein made together with the Petitions of other Counsel on file - in connection with the vast interest as to population value involved in this

precise case at issue— a rehearing and reconsideration will be granted— and if desireable Counsel will be permitted to more fully present the reasons which lead them to believe that material questions of fact have been mistaken and important and controlling issues of law overlooked in the opinion filed by the Court

N. B. We ask the Court to especially note that all the lands of the Plaintiff lie a long distance North of the mouth of Kern or Kern River— and that the Buena Vista Slough which is admitted to be a water= course wherein Kern River flows lies south of the mouth of said river and empties into Kern and Buena Vista lakes, and touches near none of the lands of Plaintiff, the opinion of the Court ~~probably may~~ and the concurring opinion clearly does make a grave mistake as to the facts in the premises growing out of a misconcep= tion as to the direction of the flow of the waters

Henry Melvin & Henry
Counsel for
Respondents

8588

Supreme Court.

Charles Suxtal

James B Haggintal

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Notice of motion for order directing issuance of Peremptory, and affidavit of Charles Sux.

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Service of a copy of the within notice and affidavit admitted this 24th day of January. 1885.

Louis J. Haggan
Atty for Deft

Filed February 5th 1885
J. W. McCarthy Clerk
By Frank Myers
Deputy

In the Supreme Court of the State of California.

Charles Lux et al
&
James B. Haggin et al. } No 8588.

To Louis T. Haggin, Esq
Defendants Attorney.

Please take notice that on Friday the 6th day of February 1885, at 10 o'clock A. M. or as soon thereafter as counsel can be heard, we shall move this Honorable Court at the Court Room thereof in the City and County of San Francisco, for an order directing the Clerk of the Supreme Court to issue and forward to the Clerk of the Superior Court of the County of Kern, State of California, a remittitur in the above entitled cause.

Said motion will be made on the ground that the decision of this Supreme Court reversing the judgment of the Superior Court, and the order denying plaintiff's motion for a new trial, has become final, and that this Court has lost juris

diction of said case, except to order the Clerk to issue a remittitur herein.

Said motion will be made upon the affidavit of Charles Sux, with a copy of which you are herewith served and upon the records of this cause and the minutes of the Supreme Court in so far as they relate to this cause.

McAllister & Burgin
Of Counsel for
Plffs

Stetson & Houghton
Attys for Apl'g.

In the Supreme Court of the State of California

Charles Sux et al
v
James B. Haggin et al.
No 8588

State of California
City and County of San Francisco. ss.

Charles Sux being duly sworn says, that he is one of the plaintiffs in the above entitled action. That judgment was in said case duly rendered against said plaintiffs and in favor of defendants in the Superior Court of Kern County, State of California, and said Court thereafter denied a motion duly made by plaintiffs for a new trial. That thereupon plaintiffs duly took and perfected an appeal to this Honorable Court from the judgment entered against them in said Superior Court, and from the order denying their motion for a new trial. That on the 27th day of October, 1884, this Court, in Banc, rendered its decision in said case and by such decision

reversed the judgment entered in said Superior Court, and also the order entered therein denying plaintiff's motion for a new trial, and ordered that said case be remanded for a New Trial.

That no previous judgment had been rendered in this Court in either of the Departments of said Supreme Court, and although more than thirty days have passed since such judgment or decision of reversal was made or rendered, no order has been made in this case in writing signed by five Justices of this Court granting a re-hearing.

That although the judgment of this Court reversing said case became final on the 26th day of November, 1884, the Clerk of this Court has refused to issue a remittitur in said case and forward a certified copy of the opinion of this Court to the Clerk of the Superior Court of the County of Kern.

Chas Lucy

Subscribed and Sworn to before me this twenty-seventh day of January, 1885

A V Iris

Notary Public